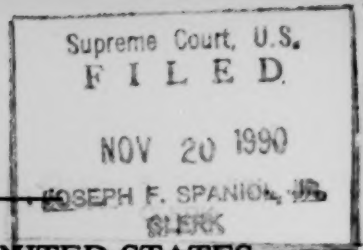


90-927

①



No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1990

COUNTY OF LOS ANGELES, Petitioner,

v.

DANIEL E. BRATT; FRANK COOKE; RAY MARIN;  
ISHMAEL S. MORAN, JR.; BILLY W. PUGH;  
RUSSELL TURNER; JAMES BLAYDES; TYRONE  
ALLAIN; Respondents.

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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## Questions Presented

1. Whether Garcia v. San Antonio Metropolitan Transit District should be overruled; or, alternatively

2. Whether the application of Garcia should be limited to its facts and the traditional government activities of deputy probation officers and child protection workers be immune from federal regulation under the commerce power.

## Parties

Petitioner, COUNTY OF LOS ANGELES, is a political subdivision of the State of California.

Respondents are:

DANIEL E. BRATT; FRANK COOKE; RAY MARIN; ISHMAEL S. MORAN, JR.; BILLY W. PUGH; and RUSSELL TURNER, deputy probation officers and employees of the County of Los Angeles; and JAMES BLAYDES and TYRONE ALLAIN, employees of the County of Los Angeles working as children's treatment counselors in the Department of Children's Services.<sup>1/</sup>

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<sup>1/</sup> Petitioner employs over 1500 deputy probation officers and over 200 child protection workers in the same work classifications as respondents.

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## **Opinions Below**

The opinion of the Court of Appeals, filed August 27, 1990, is reported at 912 F.2d 1066, and is reprinted in the attached appendix at pages 1-17.

The United States District Court gave no opinion on the question presented other than to deem the 10th amendment issues raised and denied in its minute order of March 4, 1988. The relevant part of that minute order is reprinted in the attached appendix at p. 41. The findings of fact and conclusions of law of the District Court are reprinted at pages 18-41 of the appendix.

## **Jurisdiction**

The judgment of the Court of Appeals was entered August 27, 1990 and this petition for writ of certiorari was filed within 90 days of that date. The Court has jurisdiction under United States Code, Title 28, Section 1254(1).

## **Constitutional, Statutory and Regulatory Provisions**

The following constitutional, statutory and regulatory provisions are reprinted, in whole or in pertinent part, in the attached appendix:

United States Constitution,

Article I, § 8, Clause 3;

United States Constitution, Amendment X;

United States Code, Title 29,

Sections 207(a)(1), 213(a)(1);

Code of Federal Regulations, Title 29,

Parts 541.2 (in part), 541.118 (in part),

541.207 (in part).

### **Statement Under Rule 29.4(b)**

This proceeding draws into question the constitutionality of the federal Fair Labor Standards Act. The United States is not a party to this proceeding. 28 U.S.C. § 2403(a) may be applicable.

No court of the United States has certified to the Attorney General the fact that the constitutionality of an Act of Congress was in question.

### **Statement of the Case**

The Fair Labor Standards Act (referred to in this petition as the "FLSA") requires, among other things, that covered employers pay overtime to an employee at one and one-half times the regular rate of pay of that employee for hours worked in excess of forty in a seven day work week. 29 U.S.C. § 207(a)(1). The FLSA is an expression of the federal commerce power.

The present case arose when petitioner, the County of Los Angeles, a subdivision of the State of California, classified some of its employees, including the respondents, as exempt from the time-and-one-half for overtime requirement of the FLSA under 29 U.S.C. § 213(a)(1). The respondents disagreed with this exempt classification and sued in United States District Court.

Jurisdiction of the District Court was based on 29 U.S.C. § 216(b).

The County of Los Angeles made the argument that, as a local government, it was immune from regulation by the federal commerce power. The District Court rejected this assertion. Minute Order, March 4, 1988; App. p. 41. After a bench trial the Court also found that respondents were not exempt from the FLSA under the statutory exemptions.

The United States Court of Appeals agreed with the District Court on both issues. Jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291.

The Court of Appeals felt compelled by your decision in Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985), not to make the distinction between local public mass transit activities, which were found to be subject to the federal commerce power in Garcia, and the probation and child protection activities of the County of Los Angeles at issue in this case.

Respondent deputy probation officers are employed to supervise adult and juvenile offenders under instruction from the state courts, to investigate and make recommendations to the state courts on terms and conditions of probation, and in the case of respondent Billy W. Pugh, to decide whether and how to detain juveniles who have come into custody of local law enforcement agencies.

In Cabell v. Chavez-Salido 454 U.S. 432 (1982), your Court found that County of Los Angeles deputy probation officers perform functions which "go to the heart of representative government" and substantially

impact members of a political community. 454 U.S. at 440-41. The opinion characterized the probation officers as acting as an extension of judicial authority to set the individual conditions of life of persons on probation, as an extension of the authority of the executive branch to enforce obedience to those conditions, as a personification of the state's sovereign authority, and as the symbol of the political community's control over those who have violated its criminal laws. 454 U.S. at 447

Children's treatment counselors work at MacLaren Children's Center with abused, abandoned or neglected children who must be removed from such circumstances and who have no relatives, friends, or other place to stay. MacLaren Children's Center is a refuge of last resort for these most vulnerable victims of society's darker side. These services are provided only by the County of Los Angeles. No private business acts as a refuge of last resort for these unfortunate children.

Probation and child protection activities are traditional government services with no private sector counterparts. Probation services are an essential component of the California criminal justice system. Last resort child protection services are an essential part of the social safety net in Los Angeles County.

The County of Los Angeles petitions your Court to resolve the important question of whether the federal commerce power is applicable at all to these activities, whether the rule of Garcia, supra, is unworkable in a federal system, or, alternatively, whether Garcia should be distinguished from this case.

## Reason for Granting the Writ

The opinion of the United States Court of Appeals has decided an important question of federal constitutional law which should be settled by the United States Supreme Court.

As previously noted, the Court of Appeals felt compelled by your decision in Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985), not to make the distinction between local public mass transit activities, which were found to be subject to the federal commerce power in Garcia, and the probation and child protection activities of the County of Los Angeles at issue in this case.

In Garcia your Court held that the federal political process, not judicial procedure, afforded "principal and basic" protection to state and local government from the federal commerce power. 469 U.S. at 556. The opinion does not specify how to determine when the federal political process has failed to protect state sovereignty, as petitioner contends it has failed here. It also does not define the role of federal judicial review when the federal political process fails to provide the principal and basic protection for state sovereignty. These are important issues of great significance to all state and local governments which should be addressed by your Court.

In National League of Cities v. Usery 426 U.S. 833 (1976), overruled, Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985), your Court recognized limitations on the federal

commerce power when applied to state and local government activities by holding that the determination of wages, hours of work, and overtime compensation of state and local public employees were an attribute of state sovereignty, and that the application of the FLSA to states and local governments exceeded constitutional authority where federal regulation directly displaced the States' freedom to structure integral operations in the area of traditional government functions. 426 U.S. at 852.

When your Court revisited the question of state and local government immunity from the federal commerce power in Garcia, supra, which involved a local public mass transit agency, the majority characterized the agency's activities as those which, if performed by a private business, would be subject to federal regulation under the commerce power. 469 U.S. at 537. The majority could have stopped there and found this local mass transit agency subject to federal regulation under the reasoning of United States v. California 297 U.S. 195 (1936) where a state run railroad was found to be as proper a subject of federal commerce power regulation as a privately run railroad. However, the majority went further and overruled National League of Cities v. Usery, supra, leaving unanswered the questions raised by this petition.

The direct exercise of the sovereign authority of the state criminal justice system by deputy probation officers cannot be performed by private businesses. MacLaren Children's Center is a refuge of last resort for abused children. Private businesses do not provide

such services. United States v. California is not applicable.

The FLSA is a wide ranging and pervasive intrusion into the operations of state and local governments. The United States Department of Labor regulations on FLSA exemptions are broad reaching and detailed, affecting the employer's overall compensation policies. See 29 CFR § 541.118(a). An employer motivated to obtain an administrative employee exemption is forced to structure the way a supervisor speaks to a subordinate about daily business. The litigation over the administrative exemption in this case illustrates this degree of intrusion. The administrative exemption regulations require that an employee exercise discretion and independent judgment. 29 CFR § 541.2(b). This in turn requires that the employee make independent choices, free from immediate direction or supervision, 29 CFR § 541.207(a). This part of the exemption test is applied to each individual employee's work situation. 29 CFR § 541.207(b). The day-by-day dealings between these respondents and their supervisors were scrutinized by the District Court to determine whether an individual supervisor supervised to such a degree that individual respondents were not using discretion and independent judgment.

This intrusive national regulation abrogates state and local government ability to determine and implement the means of delivering traditional government services to meet local needs. Local flexibility in delivery of traditional government

services is an essential characteristic in the federal system created and defined in the federal constitution.

Contrary to the expectations raised in Garcia, supra, the federal political process has not protected state and local government sovereignty. The federal congress has legislated since Garcia, supra. The Fair Labor Standards Act Amendments of 1985, P.L. 99-150, eff. April 15, 1986, modified application of the FLSA to state and local governments without curing the kind of infringement on state and local sovereignty present in this case.

Petitioner, County of Los Angeles, asks this Court to take up the difficult task of interpretation of the federal constitution in order to preserve a basic part of our federal system, the integrity of state and local government operations, from unduly intrusive and overbroad national regulation.

We ask that your Court return to the principles of National League of Cities v. Usery, supra, or, alternatively, that Garcia v. San Antonio Metropolitan Transit District, supra, be limited to its facts and that the probation and child protection activities of employees of the County of Los Angeles be immune from federal commerce power regulation.

## **Conclusion**

For the foregoing reasons a writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

**DE WITT W. CLINTON**

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## APPENDIX



## APPENDIX

1. Opinion of the United States Court of Appeals for the Ninth Circuit in Bratt, et al. v. County of Los Angeles; U.S.Ct.App. Nos. 89-55373, 89-55453; entered August 27, 1990

### OPINION

BOOCHEVER, Circuit Judge:

Daniel E. Bratt, Frank Cooke, Ray Marin, Ishmael S. Moran, Jr., Billy W. Pugh, Russell Turner, James Blaydes, and Tyrone Allain (Employees) appeal the district court's decision refusing to award them liquidated damages on their claim under the Fair Labor Standards Act. (FLSA or the Act), specifically 29 U.S.C. § 216(b) (1982). The County of Los Angeles (County) cross-appeals the district court's award of overtime wages, interest, and attorneys' fees in favor of the Employees on this claim. The County argues that application of the FLSA to County probation and child protection activities violates the tenth amendment and, in the alternative, that the Employees were exempt from the FLSA. We affirm.

### FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. Six of the Employees, Bratt, Marin, Cooke, Moran, Pugh, and Turner, are employed by the County's Probation Department as Deputy Probation Officers II (DPOII). These Employees conduct factual investigations for, and make recommendations to, County courts, either to aid in sentencing an adult offender or to determine whether and how to detain a minor who has been arrested.

Some of them also supervise a crew of minors who have been ordered as part of a court sentence to participate in the Juvenile Alternative Work Service program or other correctional activity.

The remaining Employees, Allain and Blaydes, are employed by the County's Department of Children's Services as Children Treatment Counselors II and III (CTC II and III) respectively. Allain and Blaydes supervise abused and neglected children at the County's MacLaren Children's Center until they can be suitably placed elsewhere. Blaydes also acts as a "team leader" for the CTC staff on his shift in his unit.

Since April 1986, all eight Employees have accumulated overtime hours for which they were not paid  $1\frac{1}{2}$  times their regular rate of pay. The Employees filed suit under the FLSA for recovery of overtime pay, liquidated damages, and attorneys' fees. After a bench trial on November 15-17, 1988, the district court found in favor of the Employees and awarded them damages in the amount of  $1\frac{1}{2}$  times their regular rate of pay for each hour worked in excess of forty per week, pre-and post-judgment interest, and attorneys' fees. The court, however, refused to award liquidated damages. Both the Employees and the County appeal the district court's decision.

## DISCUSSION

### I. Tenth Amendment

The County argues that applying the FLSA to County probation and child protection activities exceeds federal powers under the commerce clause and violates the tenth amendment. The district court did not

address this issue in its findings of fact and conclusions of law, but by proceeding with trial and judgment on the merits of the Employees' claims, the court implicitly rejected the County's constitutional challenge.

[1] The constitutionality of applying the FLSA to County probation and child protection activities is a question of law which we review de novo. See United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.)(en banc), cert. denied, 469 U.S. 824 (1984). The County maintains that its probation and child protection activities are traditional government functions and thus are beyond federal commerce power to regulate under National League of Cities v. Usery, 426 U.S. 833 (1976), overruled in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The County recognizes that National League of Cities was overruled in Garcia, but nevertheless argues that Garcia should apply only to activities such as city mass transit systems, not to the County's services at issue here.

[2] The County's attempt to resurrect the test in National League of Cities is without merit. The Court in Garcia specifically "reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" 469 U.S. at 546-47. Thus, any attempt to distinguish the decision in Garcia from the present case on the grounds that the County's probation and child protection services are more traditional government functions than mass transit services is unavailing.

## II. Exemption from the FLSA

[3] The County also argues that the Employees are exempt from coverage under the Act because they are administrative employees. The district court found that the Employees were not administrative employees and thus were not exempt from FLSA coverage. "The question of how the [Employees] spent their working time... is a question of fact [reviewed for clear error]. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law" reviewed de novo. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

[4] The FLSA provides that its overtime and minimum wage requirements "shall not apply with respect to — (1) any employee employed in a bona fide executive, administrative, or professional capacity... as such terms are defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. § 213(a)(1).

The term "employee employed in a bona fide \* \* \* administrative \* \* \* capacity" ... shall mean any employee:

(a) Whose primary duty consists of...

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers,...

... and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) ...

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent... of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week...

29 C.F.R. § 541.2 (1987)(emphasis added). "The criteria provided by regulations are absolute and the employer must prove that any particular employee meets every requirement before the employee will be deprived of the protection of the Act." Mitchell v. Williams, 420 F.2d 67, 69 (8th Cir. 1969). Thus, the County must prove that each Employee meets all five requirements in this regulation before that Employee can be held exempt from coverage under the FLSA.

[5] The key requirement for exemption for purposes of this appeal is that the employee's primary work be "directly related to management policies or general business operations of his employer or his employer's customers." Id. at 541.2(a)(1). The regulations explain that this language

describes those types of activities relating to the administrative operations of a business as a distinguished from "production"... work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business, as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control...

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase... is not limited to persons who participate in the formulation of the management policies or in the operation to the business as a whole. Employees who work is "directly related" to management policies or to general business operations include those [whose] work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business ...

(d) Under § 541.2 the "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of § 541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

Id § 541.205.

[6] The County contends that the trial court misinterpreted these regulations by concluding that the Employees were production, as opposed to administrative, employees. The primary responsibility of the DPO II Employees is to conduct factual investigations of adult offenders or juvenile detainees and advise the court on their proper sentence or disposition within the system. The County claims that the Employees' duties are more akin to those of advisory specialists or consultants such as stock brokers or insurance claim agents and adjusters - positions the regulations consider to meet the test of "directly related to management policies

or general business operations." See id. § 541.205(c)(5). Thus, the County argues, these employees are essentially "servicing" the "business" of the courts by "advising the management" and should be considered administrative under § 541.205(b).<sup>11</sup>

[7] The language of the regulations forecloses the County's argument. The test is whether the activities are directly related to management policies or general business operations. The district court correctly captured the essence of this requirement by interpreting it to mean "the running of a business, and not merely ... the day-to-day carrying out of its affairs." Accordingly, to the extent that probation activities can be analogized to a business, the work of the DPO II Employees primarily involves the day-to-day carrying out of the business' affairs, rather than running the business itself or determining its overall course or policies. This interpretation also reflects the position of the Department of Labor. In two recent letter rulings, the Department found that juvenile and adult probation officers do not qualify for exemption as administrative employees. Labor Dept., Wage and Hour Division, Ltr. Ruls. February 16, 1988 and April

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<sup>11</sup> The County's argument focuses solely on the DPO II Employees and does not address the applicability of the regulations to CTC II and III employees. The county fails to explain how or why the regulations exempt CTC II and III employees.

12, 1988.<sup>2/</sup> "We must ... give due deference to the interpretation of statutes and regulations by the agency charged with their administration." Western Pioneer, Inc. v. United States, 709 F.2d 1331, 1335 (9th Cir. 1983).

In addition, while the regulations provide that "servicing" a business may be administrative, id. § 541.205(b), "advising the management" as used in that subsection is directed at advice on matters that involve policy determinations, i.e., how a business should be run or run more efficiently, not merely providing information in the course of the customer's daily business operation. The services the Employees provide the courts do not relate to court policy or overall operational management but to the courts' day-to-day production process. Thus, the Employees are not engaged in "servicing" a business within the meaning of § 541.205(b).

The use of stock brokers and insurance claims agents and adjusters in § 541.205(c)(5) as examples of employees who are "servicing" a business is not inconsistent with the language of the regulations. To the extent that these employees primarily service as general financial

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<sup>2/</sup> Neither ruling involved the parties to this action, and the rulings were issued after the Employees filed this suit against the County. There is no indication, however, that the duties of the deputy probation officers here were different from those considered in the Labor Department's rulings.

advisors or as consultants on the proper way to conduct a business, e.g., advising businesses how to increase financial productivity or reduce insured risks, these employees properly would qualify for exemption under this regulation. Here, although probation officers provide recommendations to the courts, these recommendations do not involve advice on the proper way to conduct the business of the court, but merely provide information which the court uses in the course of its daily production activities. Thus, the duties of the Employees here do not qualify them as exempt administrative employees under the applicable regulations, even if conceivably some probation officers might be exempt.

The County also argues that we should ignore these regulations because they are drafted with commercial businesses in mind and are not applicable to public service. Although the County correctly notes that the terms used in the regulations are general business terms and that analogies between business and government often are somewhat strained, the general principles and rationales underlying the regulations are instructive in a government context, at least as they apply to the employees involved here. "Though not binding upon this court, these regulations, promulgated by the agency primarily responsible for enforcement of Congress' enactments, are entitled to great deference. The presumption is that they are valid unless shown to be erroneously in conflict

with the Act itself." Brennan v. City Stores, Inc., 479 F.2d 235, 239-40 (5th Cir. 1973). We find no conflict between the regulations and the FLSA on the issue before us and therefore defer to those regulations in interpreting the Act as it applies to the Employees.

Finally, the County maintains that applying the FLSA to the Employees here would not serve the purposes of the FLSA, which the County claims was directed against sweatshop labor rather than highly paid civil servants. The Employees, however, meet all the qualifications for coverage under the Act and are not exempted from its protection. The County's argument that this contravenes the purposes of the Act more appropriately would be made to Congress or to the Department of Labor, rather than to the courts.

[8] We agree with the district court that none of the Employees engages in activities primarily related to management policies or general business operations. None of the Employees, therefore, satisfies the first requirement of the regulation's administrative employee exception, and we need not address whether the Employees satisfy the remaining requirements. We thus affirm the district court's decision in favor of the Employees and its award of overtime compensation, interest, and attorneys' fees at trial.

### III. Liquidated Damages

Having agreed with the district court that the Employees were not exempt from coverage under the FLSA, we address whether the Employees are entitled to liquidated damages. Overtime pay for hours worked in excess of forty hours per week is required for covered employees under 29 U.S.C. § 207 (1982). "Any employer who violates the provisions of [that] section ... shall be liable to the employee or employees affected in the amount of ... their unpaid overtime compensation ... and in an additional equal amount as liquidated damages." Id. § 216(b).

[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216

....

Id. § 260. "An employer has the burden of showing that the violation of the [FLSA] was in good faith and that the employer had reasonable grounds for believing that no violation took place. Absent such a showing, liquidated damages are mandatory." Equal Employment Opportunity Commission v. First Citizens Bank, 758 F.2d 397, 403 (9th Cir.) (emphasis added and citation omitted), cert. denied, 474 U.S. 902 (1985).

The district court refused to award liquidated damages to the Employees, finding "[t]he facts are convincing to the court that the county's determinations were made in good faith and were based on reasonable grounds." The Employees challenge this decision, claiming that the County lacked both a good faith intent to comply with the FLSA and a reasonable basis for its interpretation of the FLSA and the applicable regulations. "What constitutes good faith on the part of [the County] and whether [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA] are mixed questions of fact and law." 29 C.F.R. § 790.22(c) (1987). We review such questions de novo to the extent they involve application of legal principles to established facts, and for clear error to the extent they involve an inquiry that is essentially factual. See McConney, 728 F.2d at 1202. Once the employer has demonstrated its good faith and reasonable belief, the district court's refusal to award liquidated damages is reviewed for abuse of discretion. See First Citizens Bank, 758 F.2d at 402; 29 U.S.C. § 260; 29 C.F.R. § 790.22(c).

#### A. Good Faith

The statutory requirement of good faith and reasonable grounds establishes a test with both subjective and objective components. Brock v. Shirk, 833 F.2d 1326, 1330 (9th Cir. 1987) (per curiam), vacated on other grounds 109 S. Ct. 38 (1988); see Marshall v. Brunner, 668 F.2d 748,

753 (3d Cir. 1982); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 463-66 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). "To satisfy the subjective 'good faith' component, the [County was] obligated to prove that [it] had 'an honest intention to ascertain what [the FLSA] requires and to act in accordance with it.'" Shirk, 833 F.2d at 1330 (quoting First Citizen Bank, 758 F.2d at 403); accord Brunner, 668 F.2d at 753; Laffey, 567 F.2d at 464.

Whether the County had an honest intention to ascertain what the FLSA requires and to act in accordance with it involves an inquiry that is essentially factual and which we thus review for clear error. The district court found "that an objective as possible a study was made of the job classifications for the purpose of determining presumptively exempt and non-exempt status." Moreover, there is no evidence that the County attempted to evade its responsibilities under the Act. "[A] decision made above board and justified in public is more likely to satisfy this test. An employer's willingness to state and defend a ground suggests a colorable foundation, and openness facilitates challenges by the employees. Double damages are designed in part to compensate for concealed violations, which may escape scrutiny." Walton v. United Consumers Club, Inc., 786 F.2d 303, 312 (7th Cir. 1986). The district court concluded that "[t]his is not a case, like many of those cited [by the Employees], where the employer is using

'ticky-tack' reasons to attempt to evade the wage and hour laws."

The Employees nevertheless claim that the County's lack of good faith intent to comply with the FLSA is evidenced by 1) its assignment of the coverage decisions to someone with insufficient expertise in this area; 2) its reliance solely on written job specifications as opposed to individual job descriptions; 3) its refusal to review pertinent data obtainable from internal documents as well as the Employees' representative; and 4) its establishment of group exemptions. While the Employees present arguments that the County did not do as good a job as it could have done, they fail to show that the County had anything other than an honest intention to comply with the Act. The person assigned to make the coverage decisions arguably was adequately qualified, and his decisions whether to make more extensive studies of individual jobs and corresponding data involved practical considerations on how best to complete the required evaluations in a timely fashion. The district court's finding that the County's actions were taken in good faith, therefore, was not clearly erroneous.

#### B. Reasonable Grounds

"The additional requirement that the employer have reasonable grounds for believing that his conduct complies with the Act imposes an objective standard by which to judge the

employer's behavior." Brunner, 668 F.2d at 753. Here, determining the reasonableness of the County's belief involves applying the proper interpretation of the FLSA and supporting regulations to uncontested facts, a primarily legal determination which we review de novo. Although we conclude that the County's interpretation of the regulations was incorrect, its belief in that interpretation was not unreasonable. The regulations do not specifically address government employees, and the duties performed by the DPO II Employees reasonably could be construed as analogous to those of stock brokers and insurance claims agents and adjusters, cited in the regulations as examples of exempt employees. Under these circumstances, we agree with the district court that the County had reasonable grounds for believing that it had not violated the FLSA.

[9] The district court, therefore, did not err in finding that the County acted in good faith and had reasonable grounds for its decision not to pay the Employees overtime under the FLSA. Thus, liquidated damages were not mandatory but were within the discretion of the district court to award. The Employees do not claim that the court abused its discretion in refusing to award liquidated damages - only that the court had no such discretion in this case. We conclude that the district court did not abuse its discretion by refusing to award liquidated damages.

#### IV. Attorneys' Fees

The Employees request their attorneys' fees on appeal. As the prevailing party, the Employees are entitled to reasonable attorneys' fees incurred to defend against the County's cross-appeal. See Newhouse v. Robert's Ilima Tours, Inc., 708 F.2d 436, 441 (9th Cir. 1983); 29 U.S.C. § 216(b). Because they do not prevail on their own appeal, however, they are not entitled to fees incurred pursuant to that appeal.

#### CONCLUSION

The County has not raised a sufficiently compelling argument that its probation and child protection services are constitutionally exempt from federal regulation under the FLSA. Nor are the Employees administrative employees precluded from coverage under the Act. The district court also was within its discretion in refusing to award liquidated damages to the Employees. The court's decision, therefore, is affirmed, and the Employees are awarded reasonable attorneys' fees on appeal, representing only their efforts to defend against the County's cross-appeal. **AFFIRMED.**

2. Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California in Bratt, et al v. County of Los Angeles, U.S.D.Ct. No. CV 86-5879 HLH (JRx), entered February 17, 1989.

### FINDINGS OF FACT

1. Plaintiffs Daniel E. Bratt, Frank Cooke, Ray Marin, Ishmael S. Moran, Jr., Billy W. Pugh, Russell Turner, James Blaydes and Tyrone Allain bring this action against the defendant County of Los Angeles ("County") for unpaid overtime compensation, liquidated damages, attorneys' fees and costs under Section 16(b) of the Fair Labor Standards Act ("FLSA" or "Act").

### BILLY W. PUGH

2. Since April 15, 1986, Pugh has been employed by the Probation Department of the County as a Deputy Probation Officer II. Specifically, he has been employed as an intercept officer. Also since April 15, 1987, Pugh has been employed by the Probation Department as a Crew Leader in the Juvenile Alternative Work Service ("JAWS") program. The JAWS work consists of overtime.

3. Before a minor can be detained in juvenile hall or any other County facility, the arresting agency must file a petition for detention. Pugh's duties consist of processing these petition requests filed by the arresting agency, usually either the police department or the sheriff's department. Once a petition request is filed, Pugh's primary duty is to interview the minor to make an on-the-spot evaluation of the facts of the case,

so far as he can develop them, to determine whether the juvenile should be detained under California Welfare & Institution Code § 628, or whether the minor should be released to the custody of his parents or other persons.

4. In order to make his determination, Pugh gathers facts and information from various sources. When he is called by an arresting agency to interview a minor for whom a petition for detention has been filed, Pugh travels to the police station where the minor is being held and usually speaks to the arresting officer and reviews the officer's report and the minor's arrest record. Pugh then interview the minor, and if possible, the parents and other interested parties. Through these contacts and his review of the documents, Pugh obtains the necessary information to complete a Detention Investigation Work Sheet and make his recommendation regarding detention.

5. Pugh's recommendation regarding detention are subsequently reviewed by his supervisor. Under certain circumstances his recommendation for detention required prior approval by a supervisor. However, in those cases, Pugh's views of the facts had an important place in the decision as to whether detention should be ordered.

6. At times cases arising under Welfare & Institution Code § 601 are referred to Pugh. Minors cannot be detained under § 601. These minors are status offenders such as runaways, truants and transients, and are not involved in criminal activity. In non-detained § 601 cases, often times a parent or other interested person will bring the minor to the police station. Pugh discusses with these minors various outreach options or refers them to Judge Dorn of the

Inglewood Juvenile Court who will talk to these minors. It is up to the minor whether he pursues any of the referrals Pugh may give him. In other § 601 cases, the Probation Department still does not have the right to detain the minor, but the minor has the right to request shelter. Pugh will contact a facility in a Status Offenders Detention Alternative ("SODA") program to see if he can obtain shelter. The County contracts with individuals to maintain beds in homes for these minors, but it is not a detention and they are free to leave at any time. Mr. Pugh uses discretion and independent judgement in the performance of his duties.

7. Pugh's primary job duty in the JAWS is to supervise a crew of minors who have been ordered as part of a court sentence to participate in JAWS. The juveniles under Pugh's supervision are assigned to work at public facilities to cut trees, move dead growth, weeds, trash, and clean up the schools. Pugh transports the juvenile to and from the work location in a County owned van and watches them while they work. Pugh's daily routine as a crew leader is described in detail in Probation Department memoranda which he must follow. Pugh performs this work on weekends from 5:30 a.m. to 4:15 p.m.

8. Since April 1986 there have been weeks when Pugh worked in excess of 40 hours, for which he was not paid 1/2 times his regular rate of pay.

9. Pugh earns more than \$250.00 per week from his employment with the County.

#### DANIEL S. BRATT

10. Bratt is employed by the Probation Department of the County as a Deputy Probation

Officer II. Since April 15, 1986, he has been assigned to an adult investigation case load at the Santa Monica Area Office.

11. The purpose of adult investigation is to gather facts about a criminal defendant and to prepare a written report based on these facts for the Court to review prior to sentencing the adult defendant. Bratt interviews the defendant, victims, police and other interested parties; he also reviews the defendant's records, the district attorney's file and victim restitution forms to obtain the facts needed to make a recommendation to the Court. Bratt's primary duty is to conduct a factual investigation, where specified types of information are required to be gathered and embodied in a probation report. In the report he makes a recommendation to the Court, but only after his supervisor approves the report by signing it.

12. The overwhelming majority of Bratt's time, about 80% to 90%, is spent gathering the information for the probation report, including travelling to and from the interviews.

13. After Bratt obtains all of the facts from the various sources and is prepared to make a recommendation, he is required to have a case clearing conference with his supervisor. The purpose of this conference is to arrive at a recommendation to be included in the report to the Court. During this conference Bratt discusses all of the relevant facts discovered during the investigation. Bratt clears all cases in this way, except for those which are so routine that the recommendation is almost pre-determined. [Handwritten interlineation begins]. Bratt makes his recommendations, which are seriously considered. Mr. Bratt uses discretion and independent judgement in

formulating his recommendations. Bratt's recommendations are an important part of the final recommendation and final disposition of his cases. [Handwritten interlineation ends].

14. There are certain offenses for which the defendant is legally not eligible for probation and for which state prison is mandated as the sentence. There are other offenses for which certain conditions are legally mandated if probation is granted. Further, in cases in which probation is recommended, certain terms must always be recommended pursuant to Probation Department policy. Other terms of probation recommended are dictated by the facts and the guidelines set by the Probation Department.

15. Since April 1986 there have been weeks when Bratt worked in excess of 40 hours, for which he was not paid  $\frac{1}{2}$  times my regular rate of pay.

16. Bratt earns more than \$250.00 per week from his employment with the County.

#### RUSSELL TURNER

17. Turner is employed by the Probation Department of the County of Los Angeles as a Deputy Probation Officer II. Since April 15, 1986, he has been assigned to an adult investigation case load in the South Central Area Office.

18. Turner's job duties, and the time spent on these duties, are essentially the same as Bratt's. He reviews all of his cases with his supervisor in a case clearing conference before he makes his report to the Court. The handwritten findings in ¶13 are made with respect to Mr. Turner.

19. Since April 1986 there have been weeks when Turner worked in excess of 40 hours, for which he was not paid 1½ times his regular rate of pay.

20. Turner earns more than \$250.00 per week from his employment with the County.

### FRANK COOKE

21. Cooke is employed by the Probation Department of the County as a Deputy Probating Officer II. Between April 15, 1986, and September 1986, he was assigned a case load in the Violent Offender Program ("VOP"). From September 1986 to the present he has been assigned to an adult investigation case load at Central Adult Investigation in downtown Los Angeles. During the entire time, he worked overtime on weekends in the Juvenile Alternative Work Service ("JAWS") program.

22. VOP was a program designed to provide high surveillance for offenders who had been committed certain violent acts. Cooke's primary duty, which took up approximately 80% or more of his time, was to monitor the offender's compliance with the terms and conditions of probation. To do this Cooke would read the court orders affecting the offender and according to VOP guidelines he would meet twice a month with the offender and call by telephone twice a month. Cooke would not need to file any report on the probationer unless the probation needed to be terminated or modified. This would come about if the term of probation was finished or if the probationer committed a violation of probation. Where a violation occurred, Cooke was required to notify the court by filing a report which would include a recommendation to the Court. Cooke had a case clearing conference with his

supervisor to obtain approval of his proposed report and recommendation before filing it with the Court. Reports of violations to the court occurred only about five times a month, so this aspect of Cooke's job took up very little time.

23. Cooke's job duties as an Adult Investigator, and the time spent on these duties, are essentially the same as Bratt's and Turner's. He reviews all of his cases with his supervisor in a case clearing conference before he makes his report to the Court. The written findings in ¶13 are also made with respect to Mr. Cooke both as to the VOP program and as an adult investigator.

24. Cooke's job duties in the JAWS program are essentially the same as Pugh's.

25. Since April 1986 there have been weeks when he worked in excess of 40 hours, for which he was not paid 1½ times his regular rate of pay.

26. Cooke earns more than \$250.00 per week from his employment with the County.

#### RAY MARIN

27. Marin is employed by the Probation Department of the County as a Deputy Probation Officer II. Since April 15, 1986, he has been assigned to a juvenile supervision case load in the Santa Monica Area Office. Marin has also worked on adult investigation cases during this time.

28. Marin's juvenile supervision case load involves the supervising of juveniles who have gone through the juvenile court system and against whom a petition has been sustained; the juvenile has been placed on probation with certain terms and conditions

with which they must comply. Marin's primary duty is to make sure that the juvenile complies with the court order. To do this Marin interviews the minor and makes collateral contacts with employers, victims, family, school authorities, police agencies and other related agencies.

29. Marin is responsible for completion of Progress Reports on most juveniles and file them with the court. The report advises the court of whether the juvenile is in compliance with the terms of probation, and makes a recommendation regarding the continuance, modification or termination of the court order. Marin always had a case clearing conference with his supervisor and obtained her approval before filing the report.

30. Marin's job duties as adult investigator are essentially the same as the others discussed above. He reviews all of his cases with his supervisor in a case clearing conference before he makes his report to the Court. The handwritten findings in ¶13 are adopted as to Mr. Marin's case, both as to his work as a Juvenile Supervisor and as an Adult Investigator.

31. Since April 1986 there have been weeks when he works in excess of 40 hours, for which he was not paid  $\frac{1}{2}$  times his regular rate of pay.

32. Marin earns more than \$250.00 per week in his employment with the County.

### ISHMAEL MORAN

33. Moran is employed by the Probation Department of the County as a Deputy Probation Officer II. Since April 15, 1986, he has been employed at Camp Gonzales on a shift beginning Sunday at 6:00

a.m. through Tuesday at 2:00 p.m. Moran gets two eight-hour rest periods during his shift.

34. Camp Gonzales is a secured facility which houses juveniles who have been ordered there by the Court. The minors at Camp Gonzales are generally older, have more severe arrest records, a history of runaways, or have failed at one of the other of the County's facilities. Moran's schedule during his shift is posted by his supervisor. The schedule tells Moran where he is assigned in the camp for each hour he is there. When Moran is assigned to a dormitory, his primary duty is to supervise the juveniles in daily routines. For example, Moran might accompany them to meals, recreational activities, religious services and other daily activities. And where he does not actually accompany them, Moran must make sure they get to their assigned location. Moran is also assigned to perform other duties such as field supervision (watching the juveniles on the grounds); organize recreational activities; office work (answering the telephones; clearing the count; monitoring the minors' movement between dormitories); supervision in Zuma (the intensive care unit which has separate locked rooms for certain juveniles, whom he must monitor room every 15 minutes); post positions (monitoring movement of minors from one building to another or in an area such as the dining hall). All of these functions involve watching the juveniles and making sure they behave properly. The juveniles' day and Moran's work day are broken into time increments; the activities scheduled for these time periods are generally the same day. Moran is not allowed to vary from his assigned duties for any particular time period.

35. In addition to these assignments, Moran also has a case load of six minors. Moran has responsibility for these minors' case files. There is a case work supervisor with whom Moran works to set goals for these minors. Moran's job is to monitor the juveniles' progress in meeting their goals and to record this progress in the file. Moran also counsels the minors on his case load, in accordance with camp policy. Moran does not engage in psychological counseling. There is a psychiatrist assigned to the camp for the benefit of the juveniles.

36. Moran also makes sure that the court report dates are met and court reports are filed in a timely fashion for minors in his case load. These reports, which involve termination of the juvenile's stay at camp or his return to court, are very much cut and dried and involve very limited choices, as dictated by the circumstances. All reports are discussed, cleared and approved by Moran's case work supervisor. Mr. Moran does not use discretion and independent judgement in his work.

37. Since April 1986, Moran has worked hours in excess of his 56-hour shift without receiving  $1\frac{1}{2}$  times his regular rate of pay for these hours. There are DPO I's in the camp who do the same job and Moran does and they earn  $1\frac{1}{2}$  times their regular rate of pay for hours worked in excess of their 56-hour shift.

38. Moran earns more than \$250.00 per week from his employment with the County.

## TYRONE ALLAIN

39. Allain is employed by the County's Department of Children's Services as a children's treatment counselor II ("CTC") at MacLaren Children's Center ("MacLaren") in El Monte, California. MacLaren houses abused and neglected children until they can be suitably placed elsewhere.

40. Allain's primary job duty and the function on which he spends the vast majority of his time, is to supervise the children in his unit and to make sure, along with the other CTC's on his shift, that the children make it through each day with a minimum of problems. This entails overseeing the children as they go through each step of their daily routine, from the time they wake up until their bedtime. Allain's actual work consists of tasks such as taking head counts of the children; leading them in group activities; talking with them; taking them to the doctor or dentist; breaking up fights; and in general, keeping an eye on them throughout the shift.

41. Allain does not "counsel" the children in the formal psychological sense of the word. Although Allain frequently talks with the children about their problems, it is not his job to give them psychological treatment. Serious mental problems and all other clinical aspects of the children's daily care are handled by psychiatric social workers, psychiatrists, and other therapists at MacLaren.

42. The mental health department at MacLaren maintains treatment plans for those few children with extreme mental or physical problems. Allain does not have access to the actual plans. Occasionally Allain gives input to the mental health people about particular

children, but they decide what treatment the children are to receive, and they give the actual treatment. Allain simply oversees the children, and follows certain instructions for particular children when the mental health people so advise. Mr. Allain does not use discretion and independent judgement in his work.

43. Since April 1986, there have been weeks when Allain worked in excess of 40 hours, for which he was not paid  $1\frac{1}{2}$  times his regular rate of pay.

44. Allain earns more than \$250.00 per week from his employment with the County.

### JAMES BLAYDES

45. Blaydes is employed by the County's Department of Children's Services as a CTC III at MacLaren.

46. Blaydes' job duties are essentially the same as Allain's. Blaydes' only additional responsibility as a CTC III (Allain is a CTC II) is that he acts as a "team leader" for the CTC staff on his shift in his unit. As such, he is responsible for assigning each CTC to his particular activities for the day. In practice, however, the CTC's on the team operate on their own for the most part, since they are experienced and need little supervision. Blaydes makes daily entries in a log book, briefly stating the overall status of the unit including head count, activities of the day, and problems that arose. Mr. Blaydes does not use discretion and independent judgement in his work.

47. Since April 1986, there have been weeks when Blaydes worked in excess of 40 hours, for which he was not paid  $1\frac{1}{2}$  times his regular rate of pay.

48. Blaydes earns more than \$250.00 per week from his employment with the County.

49. The facts set forth in the stipulation filed 2/10/89 are incorporated by this reference.

50. Certain conclusions of law which are in fact findings are incorporated by reference here.

### CONCLUSIONS OF LAW

1. Jurisdiction is conferred upon the Court by FLSA § 16(b), 29 U.S.C. § 216(b), and 28 U.S.C. § 1337. Venue is appropriate in that the County has its principal offices and place of business within this Court's judicial district. The facts requisite to federal jurisdiction under the FLSA were admitted by the parties.

2. FLSA § 7(a) (1), 29 U.S.C. § 207 (a) (1), provides in part:

"Except as otherwise provided in this section, no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

3. The FLSA at 29 U.S.C. § 216(b) provides in part:

"Any employer who violates the provisions of Section 206 or 207 of this title shall be liable for the employee or

employees affected in the amount of their unpaid minimum wages, or their unpaid over time compensation, as the case may be, and an additional amount as liquidated damages . . . The court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action."

4. The county claims that the plaintiffs are not entitled to one and one-half times their regular rate for each hour worked in excess of forty per week because they fall within the administrative exemption of the FLSA contained in 29 U.S.C. § 213(a)(1). The County also contends that Blaydes falls within the executive exemption contained in the same section. The County bears the burden of proving that the exemptions apply to each plaintiff.

5. It is well settled that the actual work performed by an employee determines whether he is covered by the FLSA; group classifications and job titles cannot make that determination. See Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754-55 (9th Cir. 1979) (plaintiff's status depends "upon the circumstances of the whole activity . . . Economic realities, not contractual labels, determine employment status"); Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194 (5th Cir. 1983) ("our analysis must focus upon the totality of the circumstances, underscoring the economic realities of the . . . worker's employment"); see also Rutherford Food Corp. v McComb, 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed 1772 (1947) (actual "work done,

in its essence," governs whether worker is "employee" or "independent contractor" under FLSA).

6. The regulations underscore this point. For example, the question whether an employee exercises discretion and independent judgement "must be applied in the light of all the facts involved in the particular employment situation in which the question arises." 29 C.F.R. § 541.207(b). Similarly, job titles are deemed "insufficient as yardsticks:"

"The employees for whom exemption is sought under the term 'administrative' have extremely diverse functions and a wide variety of titles. A title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status . . . " 29 C.F.R. § 541.201(b).

7. In addition to showing that the actual work performed is exempt from the Act, the County has the burden to show that the exemption applies to each individual plaintiff; there are no group exemptions for any particular job classification. See, e.g., Hodgson v. The Klages Coal & Ice Co., 435 F.2d 377, 382 (6th Cir. 1970) (employer "must prove that each employee is entitled to the exemption by plain and unmistakable evidence") (emphasis added); Mitchell v. Williams, 420 F.2d 67, 69 (8th Cir. 1969) ("the employer must prove that any particular employee meets every requirement before the employee will be deprived of the protection of the Act").

8. Although the Act itself does not define bona fide "administrative capacity," the regulations set forth at 29 C.F.R. §§541.2 and 541.201-215 provide the analytical framework for judicial interpretation. The regulations state that an employee is deemed to work in an administrative capacity

"whose primary duty consists of . . . the performance of office or non manual work directly related to management policies or general business operations of the employer or the employer's customers. . . where the performance of such primary duty includes work requiring the exercise of discretion and judgment." 29 C.F.R. § 541.214(a).<sup>1/</sup>

9. For an employee to be considered administrative, his "primary duty" must consist of the work described in the above quoted regulation. This term is explained at 29 C.F.R. §541.103, which states that as "a good rule of thumb" it means work which occupies over 50 percent of an employee's time.

10. The administrative exemptions applies only to office or "white-collar" work, and does not include manual work. 29 C.F.R. § 541.203(a). Employees who spend most of their time working with their hands, regardless of how much skill is required, are not exempt. 29 C.F.R. § 541.203(b).

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<sup>1/</sup> This definition, known as the "short form" test, applies to employees who, like each of the plaintiffs here, earn at least \$250.00 per week.

11. The phase "directly related to management policies or general business operations" in 29 C.F.R. § 541.214(a) describes "work of substantial importance to the management or operation of [a] business." 29 C.F.R. § 541.205 (c). Work directly related to management policies or general business operations refers to activities "relating to the administrative operations of a business as distinguished from 'production' or . . . 'sales' work." 29 C.F.R. § 541.205(a). It also "include[s] those [whose] work affects policy or whose responsibility it is to execute or carry it out.

12. Under the regulations, the phrase "management policies or general business operations" refers to the running of a business, and not merely to the day-to-day carrying out of its affairs. See 29 C.F.R. § 541.205(a) (distinguishing administrative operations of a business from "production" or "sales"). 29 C.F.R. § 541.205(b) provides that to be within the administrative exemption, the work must be involved in "servicing a business". The examples in the 29 C.F.R. § 541.205 (b) include advising management, planning, negotiating, representing the company, purchasing, promoting sales and business research and control. Subsection (c) makes it clear that the exemption is not limited to policy making personnel, but that it can include those whose work affects policy or those whose responsibility is to exercise or carry it out.

13. The Department of Labor has issued two Letter Rulings, dated February 16 and April 12, 1988, where it concluded that Probation Officers do not perform work directly related to management policies or general business operations but carry on the line or

"production" work of the agency and therefore are not exempt administrative employees:

"In determining whether activities are 'directly related to management policies or general business operations' of the employee, it is important to consider the nature of the 'business' itself, or in this case, the function of the government agency in question. Inasmuch as the Department has as one of its functions the providing of probation services, the probation activities performed by the [Deputy Probation Officers] would appear to be related more to the ongoing day-to-day 'production' operations of the Department than to management policies or 'general business operations.' Therefore, it is our opinion on the basis of the information you provide, that the employees employed as [Deputy Probation Officers] cannot qualify as bona fide administrative employees under section 541.2 of the regulations. Department of Labor Letter Ruling, February 16, 1988.

The Department of Labor's rulings and opinions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 164 (1944). This Court is persuaded by the rulings of the Administrator of the Department of Labor.

14. The plaintiff Deputy Probation Officers all fall within the concept of line or production employees, rather than employees whose primary duty is directly related to management policies or general business operations. The function of the Probation Department is to provide probation services. The Deputy Probation Officers perform the work to enable the Probation Department to provide these services, such as supervising juveniles, investigating criminal defendants, writing reports and recommendations to the courts. This work is not directly related to the management of the business operations of the Probation Department (i.e., the servicing of the business) but it is production work related to the principal function of the Probation Department.

15. Similarly, the plaintiff CTCs fall within the concept of line or production employees. Their duties also involve carrying out the principal function of the Department of Children's Services, specifically, to supervise abused and neglected juveniles who need supervision not otherwise being provided.

16. Because the plaintiffs' primary duty is not directly related to management policies or general business operations of the employer, they do not fall within the administrative exemption to the FLSA. Because the County has the burden of proving each element of the exemption and it has failed to prove this element, there is no need to determine the remaining issue of whether the plaintiffs' work requires the exercise of discretion and independent judgment. Such an analysis would be necessary only if plaintiffs' primary duty was directly related to management policies or general business operations. Nevertheless, with this caveat, the Court will resolve as alternative findings and

conclusions the issue of discretion and independent judgment.

17. The exercise of discretion and independent judgment is defined as "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.207(a). Moreover, the phrase "implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." Id.

18. The regulations carefully distinguish "discretion and independent judgment" from two commonly misapplied situations in which decisions are made: those involving the use of skills and procedures, and those relating to relatively insignificant matters. Employees who use their skills in applying techniques, procedures, or specific standards are not exercising discretion or independent judgment. 29 C.F.R. § 541.207(b). Thus:

"An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories ... is not exercising discretion and independent judgment .... This is true even if there is someleeway in reaching a conclusion." 29 C.F.R. § 541.207(c)(2). See also examples in 29 U.S.C. § 541.207(c)(3), (4) and (5).

19. Plaintiffs Pugh, Cooke, Turner, Marin and Bratt do exercise discretion and independent judgment in the performance of their work (except for Pugh's and Cooke's work in the JAWS program where they do not exercise such discretion and independent judgment):

a. Pugh's views of the facts have an important place in the decision as to whether detention should be recommended by the Probation Department; in the development of his recommendation he is entitled to use discretion and independent judgment in determining whether detention is necessary.

b. Bratt, Turner, Cooke and Marin (in his capacity as an adult investigator) use discretion and independent judgment in formulating their part of the recommendation to the Court; this has an important place in the ultimate recommendation to the court. Although their recommendation is considered and approved by the supervisor before any recommendation is made to the Court, if there were differing views, the supervisor and plaintiffs talk through their differences and attempt to reach an agreement. An agreement is reached in almost all cases; however, the adult investigator is not required to agree, and if he does not, the report is prepared by another adult investigator (this rarely happens and there is no evidence that it occurred with any of the plaintiffs). Moreover, the views of the adult investigator cover a wide range of items as to which there is much room for important judgment calls, such as whether the case was a state prison or probation case; if it is a state prison case, determining the level of the sentence

by evaluating the factors provided by law; if it is a probation case, determining the recommended terms and conditions of probation.

20. 29 C.F.R. § 541.1 defines an employee employed in a bona fide executive capacity as one making over \$250.00 per week and (a) whose "primary duty" is management of the business (or a department or subdivision thereof) and, (b) who "customarily and regularly directs the work of two or more other people." The relevant phrases are defined in more detail in the regulations.

21. Examples of "management of the business" are given in 29 C.F.R. § 541.102: Interviewing, selecting and training employees; setting hours and wages of other employees; directing employees' work; keeping employee records for supervision and control; appraising employees' work for promotion and disciplinary purposes; handling grievances; apportioning work among employees; and providing for their safety.

22. Plaintiff Blaydes is not employed by the County in a bona fide executive capacity and is therefore not exempt from the coverage of the FLSA.

22.5 Plaintiffs Moran, Allain and Blaydes do not use discretion and independent judgment in their work.

23. Because the plaintiffs do not come within any of the exemptions contained in the FLSA, they are entitled to recover from the County one and one-half times their regular rate of pay for each hour worked in excess of forty per week. Plaintiffs are entitled to pre-judgment and post-judgment interest. See Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986).

24. The parties have stipulated to the amount of overtime wages due, including pre-judgment interest, and this Court concludes that the following amounts are

due for the period from April 15, 1986 through the week of December 5, 1989 pursuant to the stipulation filed 2/10/89:

Daniel Bratt:	<u>\$23,871.02</u> plus \$2,110.75 interest
Ray Marin:	<u>\$23,821.66</u> plus \$2,154.88 interest
Frank Cooke:	<u>\$27,545.23</u> plus \$2,174.60 interest
Russell Turner:	<u>\$16,486.19</u> plus \$1,695.44 interest
Billy W. Pugh:	<u>\$12,815.68</u> plus \$1,239.06 interest
Ishmael S. Moran:	<u>\$1,748.75</u> plus \$150.43 interest (+ value of compensatory time off)
Tyrone Allain:	<u>\$1,208.86</u> plus \$116.99 interest
James Blaydes:	<u>\$4,453.88</u> plus \$531.00 interest

Post-judgment interest shall accrue at the rate specified in 28 U.S.C. § 1961.

25. Although 29 U.S.C. § 216(b), provides for the payment of liquidated damages in an amount equal to the amount of overtime compensation due, this section is modified by 29 U.S.C. § 260, which provides:

"if the employer shows ... that the act or omission ... was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act ... the Court may, in its sound discretion, award no liquidated damages ... "

26. The County's determination not to pay overtime compensation to the plaintiffs pursuant to the FLSA was made in good faith and on reasonable grounds. Therefore, the Court will not award liquidated damages to the plaintiffs.

27. Pursuant to 29 U.S.C. § 216(b), the court reserves jurisdiction to consider an award of attorney's fees to be considered on a post judgment motion, attorney's fees to be claimed on a cost bill.

Dated: 2/16/89

HARRY HUPP  
United States District Court

3. Excerpt from Minute Order of the United States District Court for the Central District of California in Bratt, et al v. County of Los Angeles, U.S.D.Ct. No. CV 86-5879 HLH (JRx) Dated March 4, 1988.

10th and 11th amendment issues are deemed raised by defendant and rejected by the court. (The court will not undertake to overrule the Supreme Court's Garcia decision. In addition, the 11th amendment does not apply to political subdivisions of the state, including the defendant county.)

4. **Constitutions, Statutes and Regulations**

A. **United States Constitution, Article I, Section 8**

[1] The congress shall have Power...

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

**B. United States Constitution, Amendment X**

The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

**C. Fair Labor Standards Act, 29 U.S.C. § 207(a)(1)**

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

**D. Fair Labor Standards Act, 29 U.S.C. § 213(a)(1)**

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to —

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any

employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities);

**E. Regulations of the United States Secretary of Labor, 29 CFR Part 541.2.**

The term "employee employed in a bona fide \* \* \* administrative \* \* \* capacity" in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management

policies or general business operations of his employer or his employer's customers, or . . .

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department of subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked

in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week (\$130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (\$200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent

judgment, shall be deemed to meet all the requirements of this section.

**F. Regulations of the United States Secretary of Labor, 29 CFR Part 541.118 (in part).**

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work...

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against

the salary due for that particular week without loss of the exemption.

**G. Regulations of the United States Secretary of Labor, 29 CFR Part 541.207 (in part)**

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in Subpart A of this part, moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. (Without actually attempting to define the term, the courts have given it this meaning in applying it in particular cases. See, for example, Walling v. Sterling Ice Co., 69 F.Supp. 655, reversed on other grounds, 165 F. (2d) 265 (CCA 10). See also Connell v. Delaware Aircraft Industries, 55 Atl. (2d) 637.)

(b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases

involving the following: (1) Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and (2) misapplication of the term to employees making decisions relating to matters of little consequence...

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